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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 497

WILLIAM MALAT and ETHEL MALAT, BEN LESSER and LILY LESSER, LOUIS RUDMAN and SHIRLEY RUDMAN, LOUIS LOMAS and CLAIRE LOMAS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GEORGE T. ALTMAN,
424 South Beverly Drive,
Beverly Hills, California,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, William Malat and Ethel Malat, Ben Lesser and Lily Lesser, Louis Rudman and Shirley Rudman, and Louis Lomas and Claire Lomas, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgments affirming a decision of the Tax Court of the United States.

Opinions and Judgments Below.

A copy of the opinion of the court below [R. 49-59], and of the dissenting opinion in that court [R. 59-62], is appended hereto as Appendix "A". They are reported at 302 F. 2d 700. Copies of the judgments of that court, four in number [R. 63-66], are appended hereto as Appendices "B1", "B2", "B3", and "B4". A copy of the order of that court denying, without opinion, the petition for rehearing and rehearing en banc [R. 67] is appended hereto as Appendix "C".

The record as printed for the use of the court below, nine copies of which have been filed with this petition, contains a copy of the opinion of the Tax Court [R. 7-13, reported at 39 T. C. 365], and copies of the decisions of that court. [R. 14-17.] A copy of the opinion is appended hereto as Appendix "D". The record sent up to this court also includes a typewritten motion filed in the court below to require the Tax Court to include certain additional documents in the record on review [R. 30-35], and a typewritten memorandum of respondent in opposition to that motion. [R. 36-46.] The respective judgments of the court below, copies of which, as stated above, are appended hereto as Appendices "B1" through "B4", include, in each judgment, the order of that court denying the said motion. The record sent up to this court also includes all of the Tax Court documents, numbered 1 through 85, which were actually included in the record on review of the court below. They are referred to herein by document number.

Jurisdiction of This Court.

1. The judgments below were entered April 13, 1962. [R. 63-66.] A petition for rehearing and rehearing en banc, filed April 25, 1962, was denied July 17, 1962. [R. 67.]

2. This court has jurisdiction to review the said judgments under 26 U. S. C. (Internal Revenue Code of 1954) §7482(a), and under 28 U. S. C. §1254(1).

3. The sections of the Internal Revenue Code of 1954 specified above are made applicable to this proceeding, although it involves taxable years prior to 1954, by §7851(a)(6)(C)(iv) of that code.

Questions Presented for Review.

1. Where the Commissioner of Internal Revenue, in a notice of income tax deficiency, takes on one item, in the alternative, two mutually exclusive factual positions, and before trial makes concessions on the other items so that the deficiencies as asserted in the notice are out of the case entirely, may the Tax Court, if no evidence is offered by either party, sustain the Commissioner on the item on which he has taken such alternative and mutually exclusive factual positions, without a finding as to which of those positions is right, or any finding at all?

2. May petitioners, the taxpayers, not include in the record sent up by the Tax Court to the Court of Appeals, the Tax Court files in other Tax Court dockets involving the identical income and the identical parties, for the purpose of showing by the Commissioner's own determinations in those other Tax Court dockets that the tax effects of the two alternative positions, even in the Tax Court dockets before the Court of Appeals, are widely different?

3. May petitioners, the taxpayers, not properly request the Tax Court to adopt the second of the Commissioner's two alternative positions as its finding of fact in respect to the income involved, albeit for the very purpose of affecting the result in the said other dockets?

4. On the item involved in the said alternative positions is the burden of proof on the taxpayer or on the Commissioner?

5. Was there the required determination of the deficiencies asserted in the deficiency notices?

Statutes Involved.

1. 26 U. S. C. (Internal Revenue Code of 1939, as amended) §272(a)(1), 53 Stat. 82, amended 56 Stat. 876, 957 and 59 Stat. 673:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed . . . the taxpayer may file a petition with the Board of Tax Appeals [renamed the 'Tax Court' by amendment of §1100 of the same code] for a redetermination of the deficiency. . . ."

2. 26 U. S. C. (Internal Revenue Code of 1954) §§7459(b), (d), 68A Stat. 886 (made applicable here by §7851(a)(6)(c)(iv), 68A Stat. 919:

> (b) "It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions."

> (d) "If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary or his delegate."

Statement of the Case.

The jurisdiction of the Tax Court, formerly known as the Board of Tax Appeals, depends in these proceedings on 26 U. S. C. (Internal Revenue Code of 1939, as amended) §272(a)(1) and 26 U. S. C. (Internal Revenue Code of 1954) §7442.

All of the respective petitioners reported as long-term capital gains on their individual income tax returns, net gains from the sales of certain real estate properties acquired by them from the following corporations of which they were shareholders: Pioneer Plaza, Inc., Pioneer Plaza No. 2, Inc., and Teri-Plaza, Inc. The Commissioner issued deficiency notices to the petitioners disallowing the treatment of this income as long-term capital gains [R. 50; Appendix "A", *infra*, p. 2], and also making other adjustments in each case. [R. 13, 51; Appendix "A," *infra*, p. 4, Appendix "D," *infra*, p. 29.] The petitioners petitioned the Tax Court for redetermination of the deficiencies asserted by the Commissioner.

Each notice advised the respective pair of petitioners that the "determination" of their "income tax liabilities" for the years involved disclosed "deficiencies aggregating ..... as shown on the statement attached." [For example, Tax Court Document 5, "Exhibit A" thereto, p. 1.] In respect of the gains from the sales of real estate properties, the statement attached, in each case in the same identical form, showed the disallowance as grounded on two alternative factual positions. As an illustration, in one of the notices there is the following [R. 51]:

> "The net profit of $30,045.48 returned by you as a long-term capital gain from the sale of 31 lots,

Pioneer Plaza, has been increased to a net profit of $32,962.83 from the sale of 31 homes. The homes are part of a single subdivision tract financed and constructed by Pioneer Plaza, Inc. The corrected net profit was received and retained by you under a claim of right and without restrictions as to its disposition.

"It is held the sales were those of Pioneer Plaza, Inc., and the net profits are taxable first to it and then, as corporate distribution to you as a stockholder of Pioneer Plaza, Inc., as ordinary income under section 22(a) of the 1939 Internal Revenue Code.

"In the alternative it is held that the homes were not capital assets but were held primarily for sale to customers in the ordinary course of your trade or business. The net profit from the sale is taxable as ordinary income under the provisions of section 22(a) of the Internal Revenue Code of 1939. The capital gain of $15,022.74 (50 percent of $30,045.48) has been eliminated from your income."

In their petition to the Tax Court in each case the petitioners alleged error in respect of the various disallowances. On the issue of the gains from real estate sales the allegations of fact pertinent here were as follows [for example, Tax Court Document 5, pp. 4-5]:

"(a) The said sales of property were sales by petitioner and not by Pioneer Plaza, Inc., Pioneer Plaza No. 2, Inc., or Teri-Plaza, Inc., respectively.

"(c) Petitioner did not hold said property primarily for sale for customers in the ordinary course of his trade or business."

Respondent in his answer in each case denied both of these allegations. [For example, Tax Court Document 6, p. 1.]

At a calendar call in the Tax Court thereafter respondent was asked by the Court whether he was prepared to waive either of the alternative positions taken in the deficiency notices. Respondent answered: "We cannot waive any position taken in the notice". [Tax Court Document 49, p. 5, footnote.] Petitioners in Tax Court Docket No. 63978 then filed a motion which they described as a motion for judgment on the pleadings. [Tax Court Document 17.] The relevant portion of that motion reads as follows [R. 52; Appendix "A", *infra*, p. 4]:

"MOTION"

"Petitioners move the court for judgment on the pleadings, with the resulting deficiency to be determined under Rule 50, and for that purpose show as follows:

* * * * *

"the Commissioner in his deficiency notice, . . . has held by way of an 'alternative' finding that the real estate parcels involved 'were not capital assets but were held primarily for sale to customers in the ordinary course of your [petitioners'] trade or business'.

"Petitioners now ask the court to adopt the said holding of the Commissioner as its finding of fact under these issues.

"Petitioners submit for this purpose that they are under no obligation to support by evidence a position taken by the Commissioner in his deficiency notice."

Respondent filed an opposing memorandum, admitting, however, [Tax Court Document 20, pp. 1, 2, 8-9], (1) that deficiency notices had also been issued to all of the petitioners here as transferees of the corporate entities named above, (2) that by those notices there had been asserted against them the corporate taxes indicated under the first alternative here, (3) that petitioners had filed petitions to the Tax Court appealing from those notices, (4) that the "determinations" there (that is, in those notices) were inconsistent with the "determinations" here, (5) that the corporate taxes asserted there, if legal, would under the facts there be necessary additional deductions in computing the taxes asserted under the first alternative here, (6) that as a result the alternative positions taken by the Commissioner here, if properly applied, had inherently different tax effects *here*, and (7) that if petitioners yielded to the notices here as issued the resulting taxes would be illegal and excessive. This last admission, as the court below correctly noted [R. 58; Appendix "A", *infra*, p. 13], was stated as a warning to petitioners.

Before trial was reached the other adjustments referred to in the first paragraph above were settled by stipulations and concessions. [R. 51; Appendix "A", *infra*, p. 4.] As a result, when trial was reached the deficiency amounts asserted in the deficiency notices were out of the case entirely. At the trial, on the remaining issue, that involving the gains from real estate sales, the petitioners in Tax Court Docket Nos. 63976, 63977, and 63979 filed motions for judgment on the pleadings, in the same terms verbatim as the motion described above previously filed by the petitioners in

Docket No. 63978. [Tax Court Document 36.] The petitioners in all four dockets offered no evidence. The Commissioner also offered no evidence.

The Tax Court then took the cases, including the motions, under submission. [Tax Court Document 41, pp. 430-434.] Briefs were filed. Petitioners in their opening brief, and respondent in his reply brief, specified the Tax Court docket numbers of the proceedings involving the petitioners herein as transferees in respect of the corporate taxes, those numbers being 63410-63413, 63415-63418, and 65755-65758. [Tax Court Documents 43, p. 5; 49, p. 3.] In a supplementary brief respondent repeated his warning to the petitioners, saying that by their motions they might be "placing themselves in a remediless situation whereby irreconcilable theories of fact [would] produce a double tax on the gain from the subdivision sales". [Tax Court Document 51, p. 7.]

The Tax Court, on May 31, 1960, rendered its opinion. [R. 7-13; 34 T. C. 365; Appendix "D," *infra*.] In the course of that opinion it denied the motions and ruled that decisions would be entered under Tax Court Rule 50 based upon the stipulations and concessions as to the other issues and upon the Commissioner's "holding of the amounts to be added to income under the adjustments as to house sales." The opinion then added [R. 13; 34 T. C. at p. 368; Appendix "D," *infra*, p. 20]:

> "It is to be understood that such judgments will be based upon the presumption of correctness of respondent's determinations and petitioners' failure to sustain their burden of proving they were not."

Computations under Rule 50 were then made by the Tax Court; over petitioners' objection that there were no

findings from which they could be made. [Tax Court Document 66, pp. 3-4.] Decisions were entered on December 8, 1960, in accordance with those computations. [R. 14-17.] The deficiencies, as asserted in the notices and as decided by the Tax Court under Rule 50, were as follows:

		Deficiency per Deficiency Notice [R. 8]		Deficiency per Decision of Tax Court [R. 14-17]	
	Year		§294(d)(2)		§294(d)(2)
Petitioners	Ended	Tax	Penalty	Tax	Penalty
Wm. & E. Malat	12/31/50	$14,542.59	$1,003.26	$10,289.33	$ 748.07
Wm. & E. Malat	12/31/51	12,746.75	1,092.46	6,418.50	899.28
B. & L. Lesser	11/30/50	12,923.84	1,010.01	8,807.14	763.01
B. & L. Lesser	11/30/51	11,253.70	None	3,005.60	None
L. & S. Rudman	12/31/50	15,225.83	1,424.60	10,640.18	1,149.46
L. & S. Rudman	12/31/51	12,950.63	1,142.63	6,658.81	926.01
L. & C. Lomas	12/31/50	18,083.77	1,362.28	13,387.83	1,092.53
L. & C. Lomas	12/31/51	9,958.91	1,186.22	3,726.63	975.89

The petitioners thereafter, on February 27, 1961, filed petitions for review by the United States Court of Appeals for the Ninth Circuit. [R. 18-20; Tax Court Documents 71-74.] In those petitions they expressly raised the issue of a conflict, under the particular facts here, between, on the one hand, the Commissioner's determinations of individual income taxes involved in these proceedings, and, on the other hand, his determinations of corporate income taxes involved in the said other Tax Court proceedings, which were based on the *same* income and asserted against these *same* petitioners as transferees. [R. 19-20; Tax Court Documents 71-74.] For the purpose of showing that conflict, by the Commissioner's own schedules and admissions, they included, in their designation of contents of record on review, documents filed in the said other Tax Court proceedings

[R. 20-21]; and they also included that conflict as a separate point in the statement of points on which they intended to rely on review. [R. 27, par. 8.] Respondent moved to exclude those documents, however, and his motion was granted. [Tax Court Document 84.] Petitioners then filed a motion in the Court of Appeals to require the Tax Court to send those documents up, on the ground that those documents had a direct bearing on this proceeding, and that they were necessary to bring the cause adequately before the court. [R. 30-34.] In the same motion petitioners asked in the alternative that the court suspend this proceeding until those transferee cases could be tried, in order that the full proceeding could be adequately brought before the court. [R. 31.] This motion was continued to the hearing on the merits.

After such hearing, and on April 13, 1962, the court below affirmed the decision of the Tax Court and at the same time denied the said motion to order the Tax Court to include in the record on review the documents in the transferee cases. [R. 59; 302 F. 2d at p. 707; Appendix "A," *infra*, p. 14.] The court below based that affirmance on the grounds relied on by the Tax Court. In its majority opinion it said that "the burden [was] on the taxpayers to show that the Commissioner was in error" and that they had "abdicated this burden." [R. 57; Appendix "A", *infra*, p. 11.] Judge Jertberg filed a dissenting opinion. [R. 59; 302 F.2d at p. 707; Appendix "A," *infra*, p. 14.] Petitioners thereafter, on April 25, 1962, filed a petition for a rehearing with suggestion that the rehearing be en banc. That petition was denied July 17, 1962. [R. 67; Appendix "C," *infra*.]

REASONS FOR GRANTING THE WRIT
and
ARGUMENT AMPLIFYING THEM

I.

The Decision Below Is in Direct Conflict With Decisions of Other United States Courts of Appeals.

Intercircuit conflict appears here on two issues. One is that of the requirement of findings.

On that issue the dissenting opinion below, reaching the conclusion that, the Commissioner having taken alternatively two mutually exclusive factual positions, the Tax Court was required to make findings, cited and quoted [R. 60-61; Appendix "A," *infra*, pp. 16-17] from *Timmons v. Commissioner*, 198 F. 2d 142, and also cited *Estate of Albert E. MacCrowe, etc., et al. v. Commissioner*, 252 F. 2d 293, both decided by the United States Court of Appeals for the Fourth Circuit.

Both of those cases clearly require that the Tax Court's decision be supported by findings of the facts. The majority opinion below, however, conceding that here "there has been no determination by the Tax Court either as to the facts or the law," [R. 57; Appendix "A"; *infra*, pp. 11-12] attempts to distinguish the cited cases; nevertheless, on two grounds.

One of those grounds is that in "most of those cases evidence was received." [R. 57; Appendix "A", *infra*, p. 12.] However, in neither of the two cases referred to of the Fourth Circuit were findings required because there was evidence. Findings were required clearly and expressly because the determination must show the factual basis upon which it rests.

The other ground relied on by the majority below [R. 58-59; Appendix "A", *infra*, pp. 13-14] is that the decision of the Tax Court here amounted to a simple dismissal. A dismissal is authorized by §7459(d) of the Internal Revenue Code of 1954, which states that "a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined" by the Commissioner. However, because of concessions here by the Commissioner on other issues the amount determined by the Commissioner was taken out of the case entirely. As a result of this the majority opinion below found it necessary to say [R. 59; Appendix "A", *infra*, at p. 14]:

> "What the Tax Court did is equivalent to such a dismissal. It simply entered a judgment, as to this issue, determining that the deficiency was the amount assessed by the Commissioner."

This misstates completely what the Tax Court in fact did. There was no judgment entered, nor deficiency determined, nor assessment made, separately on the issue involved in the Commissioner's two mutually exclusive factual alternatives. Nor is any such thing possible. As held by the Fifth Circuit in *United States v. C. C. Clark Inc.*, 159 F. 2d 489, 490, cert. denied 331 U. S. 818, income tax liability for any one year is indivisible; there is no authority to enter a judgment, or determine a deficiency, or make an assessment, separately on one issue. As a result, in attempting to distinguish the cited cases of the Fourth Circuit on this second ground the majority below runs into clear conflict with the Fifth Circuit also.

Nor is the Fourth Circuit alone in holding that there must be findings supporting the Tax Court's con-

clusions. The same position, in effect, is taken by the Seventh Circuit in *Ketler v. Commissioner,* 196 F. 2d 822, 827, and the Eighth Circuit in *The Kansas City Southern Railway Company, et al. v. Commissioner,* 52 F. 2d 372, 379. The Second Circuit, in *Long Island Drug Co., Inc. v. Commissioner,* 111 F. 2d 593, 594-595, and the Sixth Circuit, in *Gamble, Executor v. Commissioner,* 101 F. 2d 565, 568, have indicated the same position by holding that the Tax Court may satisfy the requirement of findings by merely approving the Commissioner's findings. The position of all of these courts is clearly in conflict with the position taken here in the majority opinion below that where, as here, the Commissioner's findings are themselves in conflict, a deficiency may be sustained *without any findings at all.*

The second issue on which intercircuit conflict appears here is that of burden of proof.

On that issue the dissenting opinion below calls attention to a statement of the Tax Court in another case that "conflicting determinations of the Commissioner detract from, if they do not completely nullify, any presumption of correctness otherwise attributable to them." [R. 62; Appendix "A" *infra,* p. 18.] In *Welch, et al. v. Commissioner,* 297 F. 2d 309, decided by the Fourth Circuit, there was a similar conflict in the Commissioner's determination. The taxpayer there relied upon a conflict with the Commissioner's own figures in other dockets before the court. The court there stated, at page 311:

> "In short, the presumption of correctness to which the determination of the Commissioner is ordinarily entitled was destroyed by its own inherent defect. Under these circumstances the bur-

> den of proof did not rest upon the taxpayer, and the Tax Court was not justified in basing its decision upon the failure of the taxpayer to show the precise amount of the deductions to which he was entitled."

Thus on the issue of the necessity for findings, and also on the issue of burden of proof, the judgment below results in a clear conflict between the circuits.

II.

The Decision Below Is in Conflict With Prior Decisions of the Same Court and Reveals a Conflict Within That Court.

Intracircuit conflict has been held by this court to be a proper ground for granting the writ. *John Hancock Ins. Co. v. Bartels*, 308 U. S. 180, 181; *Dickinson v. Petroleum Conversion Corp.*, 338 U. S. 507, 508.

Such a conflict also appears here in respect of two issues. One is again the issue of burden of proof.

In *Revell, Inc. v. Riddell*, 273 F. 2d 649, cert. denied, 364 U. S. 835, which was decided by the court below and in which petitioner Malat was also one of the petitioners, decision was rendered by a unanimous panel consisting of Judges Stephens, Hamlin, and Jertberg. In the opinion, written by Judge Jertberg, the court there stated at page 659:

> "Conceivably the Commissioner may lose the benefit of such presumption [the presumption of correctness], if it should be made to appear to the Tax Court that the Commissioner has made conflicting determinations against the same person in respect to the same income. In such event the burden of proof would be upon the Commissioner to establish the correctness of his determination."

This statement in the *Revell* case, although gently worded, was clearly not dictum; it was necessary to the decision there. The majority of the court below in this proceeding, while citing the *Revell* case on another point [R. 57; Appendix "A", *infra*, p. 11], makes no attempt to distinguish that case on this important issue of burden of proof. Judge Jertberg, however, who, as stated, wrote the opinion there, dissented here below and in his dissenting opinion reaffirmed the position which he took there on the issue of burden of proof. [R. 62; Appendix "A", *infra*, p. 18.]

We have thus on the issue of burden of proof a clear conflict within the court below.

The second issue on which such a conflict appears here is the issue whether the petitioners could, without putting in any evidence, require the Tax Court to make a finding adopting the second alternative position taken by the Commissioner in his deficiency notices, or whether, on the contrary, they had to put in evidence in order to sustain that position.

The case of *Harbor Plywood Corporation v. Commissioner*, 143 F. 2d 780, decided by the court below, and cited on this point in the dissenting opinion below [R. 60; Appendix "A" *infra*, p. 15], was decided by a panel consisting of Judges Wilbur, Denman and Matthews. The distinction of that case by the majority opinion here below [R. 57; Appendix "A", *infra*, p. 12] has no relation to the question here. The question here is solely whether the taxpayer can be required to put in evidence to sustain a position taken by the Commissioner in his deficiency notice. The *Harbor Plywood* case, at page 783, says clearly and

distinctly that he cannot. The majority here in the court below took the contrary view.

Thus, on the two issues noted, a conflict appears within the court below. This would properly have been a situation calling for a hearing, or rehearing, in that court en banc. Petitioners sought a rehearing en banc, but it was denied. [R. 67; Appendix "C", *infra.*] In that connection it is pertinent to note that under Rule 23 of the court below, the panel which hears the case in the first instance determines whether a rehearing en banc should be granted. Clearly the situation is one which calls for a hearing by this court in the exercise of its function of supervision over the lower federal courts.

III.

The Decision Below Is in Probable Conflict With Pertinent Decisions of This Court.

The case of *Helvering v. Taylor*, 293 U. S. 507, appears in the dissenting opinion below as support for the proposition that conflicting determinations of the Commissioner, such as we have here, "detract from, if they do not completely nullify, any presumption of correctness otherwise attributable to them." [R. 62; Appendix "A", *infra*, p. 18.] The majority opinion mentions that case only as one of the group which it says can have no application here because in "most of those cases evidence was received." [R. 57; Appendix "A", *infra*, p. 12.] The question here, however, is the effect on burden of proof of a conflict in the Commissioner's own determination; such a conflict does not show what is right, but certainly shows that the Commissioner's determination cannot be, so that, under the *Taylor* rule,

the burden of proof is no longer the taxpayer's, but the Commissioner's. We submit that the decision below is, on the issue of burden of proof, in definite conflict with the *Taylor* case.

Another case in this court, that of *Helvering v. Tex-Penn Oil Company,* 300 U. S. 481, appears in the dissenting opinion below as support for the proposition that a redetermination by the Tax Court "should inform the taxpayer of the basis of law and fact supporting the redetermination". [R. 60; Appendix "A", *infra,* p. 16.] In that case this Court, at page 498, said:

> "The taxpayers were entitled to know the basis of law and fact on which the Commissioner sought to sustain the deficiencies."

The majority below attempts to distinguish that case [R. 57; Appendix "A", *infra,* p. 12] on the ground that there this Court disagreed only with the Tax Court's "legal conclusion", on the thin ground, in other words, that as far as fact, as distinguished from law, is concerned the statement above quoted from the opinion there was mere dictum. We view the quoted proposition, however, as a unitary one, as meaning simply and clearly that the taxpayer is entitled to know—indeed, to have authoritatively determined—the basis upon which the exaction from him is made. We submit that the decision below is in clear conflict with the *Tex-Penn* case.

The decision below also runs afoul of the decisions of this Court in *New York Indians v. U. S.,* 170 U. S. 1, 32; *United States v. Pink,* 315 U. S. 203, 216, and *Freshman v. Atkins,* 269 U. S. 121, 123-124. This Court there held that a court may take judicial notice of its own files in other proceedings which bear upon the

proceeding at hand. Here the Tax Court's attention was directed, before trial [Tax Court Document 20, pp. 1, 2, 8-9], and after trial [Tax Court Documents 43, p. 5, 49, p. 3], to related cases in its files, the cases in which these same petitioners are being pursued, as transferees, for corporate taxes on the same income. The court below, as the majority opinion shows [R. 56; Appendix "A", *infra,* pp. 10-11], was made fully aware of what those files contained. Indeed, it concedes [R. 58; Appendix "A", *infra,* p. 13] that those files may well show that duplicating and excessive taxes have been imposed on petitioners, but appears to assume that it has no right to look at them. Clearly the court below, in refusing to grant petitioners' motion to require the Tax Court to send those files up as a part of the record on review, is in conflict with the above mentioned decisions of this Court.

IV.

The Issues Involved Here Are Important in the Administration of the Revenue.

This reason for granting the writ appears in numerous decisions of this court. We cite the following:

Detroit Bank v. U. S., 317 U. S. 329, 331;

Harrison v. Northern Trust Co., 317 U. S. 476, 478;

Helvering v. Griffiths, 318 U. S. 371, 372;

Achilli v. U. S., 363 U. S. 373, 374;

Sanford's Estate v. Commissioner, 308 U. S. 40, 42.

The dissenting opinion below says [R. 59; Appendix "A", *infra*, p. 15]:

> "I write at some length only because I feel that the decision in this case involves procedural matters which are important in the administration of the Revenue laws."

In this connection we may note that the Commissioner himself is fearful that conflicting determinations against the same persons are wholly invalid, that they do not even give the Tax Court jurisdiction to hear the proceeding. That was the issue involved in the *Revell* case cited above. One of the petitioners there also sought an adjudication on the same issue from the United States Court of Claims, by paying one of the assessments and suing in that court for a refund. That suit never reached trial. The Commissioner hastily refunded the payment in full, plus interest, and obtained a dismissal on the ground that the cause had become moot. *Revell, Inc. v. United States,* Ct. Cls. docket number 105-59.

We submit that, as the dissenting opinion below states, the issues involved here are important in the administration of the Revenue laws, and that the writ should be granted in order that these issues may be finally resolved.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

William Malat and Ethel Malat, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 17,289.

Ben Lesser and Lily Lesser, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 17,290.

Louis Rudman and Shirley Rudman, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 17,291. Apr. 13, 1962.

Louis Lomas and Claire Lomas, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 17,292.

On Petitions for Review of the Decisions of the Tax Court of the United States.

Before: Jertberg and Duniway, Circuit Judges, and Davis, District Judge.

Duniway, Circuit Judge:

We have before us four separate petitions to review four separate decisions of the Tax Court of the United States. The four cases were consolidated for hearing and briefing before the Tax Court. The opinion of the Tax Court is reported at 34 T. C. 365.

Since the questions of law presented for decision on the several petitions are common to the four cases, we will dispose of the four cases in a single opinion.

Three of the petitions involve income taxes and additions to tax for the calendar years 1950 and 1951. The other petition involves income taxes and additions to tax for the fiscal years ended November 30, 1950, and November 30, 1951.

In all four cases the respective taxpayers reported as long-term capital gains on their individual income tax returns for the two taxable years stated, net gains from the sales of certain real estate properties acquired by them from the following corporations of which they were shareholders: Pioneer Plaza, Inc., Pioneer Plaza No. 2, Inc., and Teri-Plaza, Inc. The Commissioner issued deficiency notices to petitioners on their individual income taxes for those two years disallowing the treatment of this income as long-term capital gains.

The Commissioner determined deficiencies in income tax and additions to tax as follows:

Petitioner	Year	Deficiency	Additions to tax under section 294(d)(2), IRC of 1939
William Malat and Ethel Malat	1950	$14,542.50	$1,003.26
	1951	12,746.75	1,092.46
Ben Lesser and Lily Lesser	Taxable year ended Nov. 30, 1950	12,923.84	1,010.01
	Taxable year ended Nov. 30, 1951	11,253.70	none
Louis Rudman and Shirley Rudman	1950	15,225.83	1,424.60
	1951	12,950.63	1,142.63
Louis Lomas and Claire Lomas	1950	18,083.77	1,362.28
	1951	9,958.91	1,186.22

The Commissioner in the several notices of deficiency, after setting forth the amounts of deficiency indicated above, attached several schedules showing the adjustments made to net income and an explanation of the adjustments. As an illustration, the relevant portion of Schedules 1 and 2 attached to one of the deficiency notices is as follows:

"Commissioner of Internal Revenue"
"Taxable Year Ended December 31, 1950"
"Schedule 1"
"Adjustments to Net Income"

"Net income as disclosed by the return		$33,339.47
"Additional income:		
"(a) Ordinary income	$51,866.69	

* * * * * *

"Schedule 2"
"Explanation of Adjustments"

"(a) Pioneer Plaza, Inc.	32,962.83[1]

* * * * * *

"[1]The net profit of $30,045.48 returned by you as a long-term capital gain from the sale of 31 lots, Pioneer Plaza, has been increased to a net profit of $32,962.83 from the sale of 31 homes. The homes are part of a single subdivision tract financed and constructed by Pioneer Plaza, Inc. The corrected net profit was received and retained by you under a claim of right and without restrictions as to its disposition.

"It is held the sales were those of Pioneer Plaza, Inc., and the net profits are taxable first to it and then, as corporate distribution to you as a stockholder of Pioneer Plaza, Inc., as ordinary income under section 22(a) of the 1939 Internal Revenue Code.

"In the alternative it is held that the homes were not capital assets but were held primarily for sale to customers in the ordinary course of your trade or business. The net profit from the sale is taxable as ordinary income under the provisions of section 22(a) of the Internal Revenue Code of 1939. The capital gain of $15,022.74 (50 percent of $30,045.48) has been eliminated from your income."

The other deficiency notices contain similar adjustments which followed the same pattern differing only in amount.

After all four cases were at issue in the Tax Court, issues not involved in this appeal were settled by stipulations and concessions which resulted in a reduction of deficiencies asserted for each of the two years below the amounts stated in the deficiency notices.

Prior to the time for hearing of the consolidated cases, the petitioners in each case filed a motion for judgment on the pleadings. As an illustration, the relevant portion of the motion in one of the cases is as follows:

"MOTION"

"Petitioners move the court for judgment on the pleadings, with the resulting deficiency to be determined under Rule 50, and for that purpose show as follows:

"* * *,

the Commissioner in his deficiency notice, * * *, has held by way of an 'alternative' finding that the real estate parcels involved 'were not capital assets but were held primarily for sale to customers in the ordinary course of your [petitioners'] trade or business.'

"Petitioners now ask the court to adopt the said holding of the Commissioner as its finding of fact under these issues.

"Petitioners submit for this purpose that they are under no obligation to support by evidence a position taken by the Commissioner in his deficiency notice. * * *"

Similar motions were filed by petitioners in the other cases.

Consistent with the position taken in the motions, petitioners offered no evidence nor did the Commissioner. Hence, when the cases were submitted to the Tax Court for decisions, there remained only the issues raised by the motions for judgments on the pleadings.

The Tax Court denied the motions for judgments on the pleadings. In its opinion the Tax Court stated:

> "* * * The motions do not state the dollar amount of the judgments they request be entered against them but obviously they are requesting judgment for the full amount of the tax deficiency since they ask it be entered on a finding of fact that will produce that sum.
>
> "* * * These motions seek judgments of this Court against the moving parties in the exact amount of tax determined on the adjustments. That would be the judgments this Court would enter if no motions were filed and no evidence introduced.
>
> "The only apparent purpose of the motions would be to have this Court decide in the case of the stockholder, and without any evidence, that his corporation had no income from the sale of residences. Obviously this would not be proper. The cases of the corporations may be pending before this Court. Their liability for tax cannot be adjudicated by such a pleading maneuver as petitioners make.
>
> "Since petitioners, who have the burden of proof, submitted their cases on such motions without any

evidence, the motions are utterly meaningless. Since they move for judgment against themselves in the exact amount determined, and introduce no evidence, and state they do not care to introduce evidence but will rest on their motions, they have no standing to ask this Court to base its judgments on conceded facts, or any pleading admissions. Respondent's determination of a deficiency is presumptively correct. When there is failure on the part of a taxpayer to introduce any evidence that it is not, the only judgment that will be entered against him for the determined deficiency will be based upon that presumption of correctness that attaches to respondent's determination and the taxpayer's failure to carry his burden of proof to show it was not.

"Petitioners' motions for judgments to be based upon this Court adopting any part of respondent's Explanation of Adjustments as its findings of fact, are denied. Respondent will have judgments against petitioners upon his determinations of tax due based upon his holding of the amounts to be added to income under the adjustments as to house sales which appear in all dockets. * * * It is to be understood that such judgments will be based upon the presumption of correctness of respondent's determinations and petitioners' failure to sustain their burden of proving they were not. Both parties state there are stipulations and concessions with respect to other adjustments and that a Rule 50 computation will be necessary in all the dockets.

"Decisions will be entered under Rule 50."

Separate decisions were rendered in the four cases. As an illustration, the decision in one of the cases is as follows:

> "Ordered and Decided: That there are deficiencies in income tax for the taxable years 1950 and 1951 in the respective amounts of $10,289.33 and $6,418.50, and there are additions to tax under Section 294(d), I.R.C. of 1939, for the taxable years 1950 and 1951 in the respective amounts of $748.07 and $899.28."

The decisions in the other cases were in the same form differing only in the amounts of deficiencies and additions to tax.

We will first consider petitioners' contention that the Tax Court lacked jurisdiction to redetermine the determinations made by the Commissioner in these four cases. Petitioners argue that, by reason of the conflicting holdings by the Commissioner in the deficiency notices as to the factual basis for the deficiencies, either no determinations were made or the Commissioner acted arbitrarily and capriciously in making the same. We find no merit in this argument. If the Commissioner had chosen incorrectly to assert in his deficiency tax determinations only one factual basis reasonably grounded in the data procured, conceivably the bar of the Statute of Limitations on assessment would preclude assertion of another factual basis likewise reasonably grounded on the data in his possession. As stated in *Revell, Inc. v. Riddell,* 273 F. 2d 649 (9th Cir. 1959), *cert. denied* 364 U. S. 835, at p. 660:

> "* * * We find no legal or logical reason which compels the Commissioner to run such risk in the proper performance of his duty to protect the revenue."

Since the determinations made by the Commissioner in these cases were valid, petitioners properly invoked the jurisdiction of the Tax Court by filing their petitions for redetermination of the deficiencies. INT. REV. CODE OF 1939, §272 [26 U. S. C., 1952 ed., §272]; INT. REV. CODE OF 1954, §7442 [26 U. S. C., 1958 ed., §7442.]

We now consider petitioners' contention that the Tax Court erred in its failure to make findings of fact in support of its redetermination of tax deficiencies.

The Tax Court made no separate findings of fact and no finding of fact appears in the opinion unless it be the following statement:

> "* * * Respondent will have judgments against petitioners upon his determinations of tax due based upon his holding of the amounts to be added to income under the adjustments as to house sales which appear in all dockets."

We do not regard such statement as a finding of fact that petitioners made any "house sales." It is clear that such statement was only for the purpose of identifying the particular adjustments to be made under Rule 50 of the Tax Court and was not intended to be a finding of fact that the "house sales" were made by petitioners.

It is clear that if the "motions for judgment on the pleadings" be accepted as being, in fact, the type of motions that they purport to be, they could not properly have been granted by the Tax Court. This is demonstrated by the pleadings before that court. In each case, the pleadings are in similar form. Taking the Malat case (No. 17,289) as an example, the petition to

the Tax Court assigns in paragraph 4 a number of alleged errors. In respect to the year 1950 it states:

> "(a) The Commissioner erred in treating the amount of $32,962.83, representing net profit from the sale of 31 homes, as net profit of Pioneer Plaza, Inc., taxable to petitioners as a distribution from said corporation.
>
> "(b) The Commissioner erred in treating the said amount of $32,962.83 in the alternative as ordinary income from the sale of said homes by petitioners, instead of as capital gain."

There are assignments identical in form regarding Pioneer Plaza #2, Inc., and Teri-Plaza, Inc. There are also similar assignments relating to the year 1951. In paragraph 5 of the petition, as to each of these assignments of error relating to the year 1950, there are the following allegations:

> "(a) The said sales of property were sales by petitioner and not by Pioneer Plaza, Inc., Pioneer Plaza #2, Inc., or Teri-Plaza, Inc., respectively.
>
> "(b) Petitioner was not in the business of selling real estate.
>
> "(c) Petitioner did not hold said property primarily for sale to customers in the ordinary course of his trade or business."

Similar allegations appear in paragraph 9 of the petition as to each of the assignments of error relating to the year 1951. In his answer the Commissioner denies *inter alia* the allegations of paragraphs 4, 5 and 9.

Thus, in each case the pleadings on their face raise an issue of fact as to whether the sales were sales by

the petitioner rather than by the corporation, and if the former, whether the petitioner was in the business of selling real estate and held the property primarily for sale to customers in the ordinary course of his trade or business. Under these circumstances, it is perfectly clear that motions for judgment on the pleadings were improper.

If, on the other hand, either the motions for judgment on the pleadings, or the refusal to produce evidence, or both, be treated as admissions, as the Tax Court treated them, their ultimate effect is to admit the correctness of the amount of the deficiency determined by the Commissioner, insofar as the same is based upon the sales of the homes or lots in question. The facts that each motion also purports to be an admission of the correctness of one of the Commissioner's two alternative *theories* is, to us, immaterial. The objective of a proceeding before the Tax Court is not to expound legal theories or to make advisory findings or to render advisory opinions, but to arrive at a determination of how much tax, if any, the petitioner owes. When the petitioners concede that the tax determined by the Commissioner is owed, as they did in this case, then the fact-finding and law-expounding function of the Tax Court is at an end, and nothing remains to be done except to enter an order determining the amount of the deficiency. That is precisely what the Tax Court did here.

We are advised that there are pending before the Tax Court other cases in which the Commissioner has asserted deficiencies against the corporations involved and in which these same petitioners are also the peti-

tioners because they are transferees of the corporations' assets. It thus appears that what the taxpayers here have tried to do is to execute a maneuver whereby they hoped, without presenting any evidence on the subject, to obtain a binding adjudication that the sales were by them and not by the respective corporations, thereby killing off the other pending cases. The Tax Court refused to lend itself to this little game, and we think that what it did was proper.

Petitioners could have proceeded to present evidence to show whether or not the sales were by them or by their corporations. This they refused to do, and they are now in no position to complain of the consequences of that refusal.

It is suggested that the Tax Court should have made findings. We do not agree. The correctness of the Commissioner's ultimate determination, namely, that so many dollars of additional tax are due, having been conceded, we can see no reason why findings in support of that concession are required. We have held that a determination by the Commissioner in his 90-day letter, based upon alternative grounds, is proper and gives the Tax Court jurisdiction. (*Revell, Inc. v. Riddell,* supra, 9 Cir., 1959, 273 F. 2d 649). Under these circumstances, we think that, as in other cases, the burden is on the taxpayers to show that the Commissioner is in error. The taxpayers having abdicated this burden and refused to offer any evidence, there was nothing before the Tax Court on the basis on which it could make findings. By this same token, the decision in these cases can hardly be claimed by either party to be res judicata in other pending cases as to the correctness of

either of the Commissioner's alternative theories, as distinguished from the amount of tax due, since there has been no determination by the Tax Court either as to the facts or the law, in view of the taxpayers' refusal to proceed with their cases.

Such cases as *Helvering v. Taylor*, 1935, 239 U. S. 507; *Helvering v. Tex-Penn Compauy*, 1937, 300 U. S. 481; *Harbor Plywood Corporation v. Commissioner of Internal Revenue*, 9 Cir., 1944, 143 F. 2d 780; *Timmons v. Commissioner of Internal Revenue*, 4 Cir., 1952, 198 F. 2d 142; *Estate of MacCrowe v. Commissioner of Internal Revenue*, 4 Cir., 1958, 252 F. 2d 293, and *Welch v. Commissioner of Internal Revenue*, 4 Cir., 1961, 297 F. 2d 309, can have no application here. In most of those cases evidence was received, and the Tax Court was properly required to make appropriate findings; in effect, they deal with a shifting of the burden of proof when the taxpayer presents evidence. In *Harbor Plywood*, the Commissioner was held bound by his own determination of the value of certain depreciable assets; there was no such admission by the taxpayer as is here involved. In *Tex-Penn Co.*, the Board had made findings and the court disagreed only with its legal conclusions. In *Welch*, the Commissioner's determination was erroneous on its face. Under the circumstances of the cases now before us, the Tax Court was not required to demand that the Commissioner produce evidence, nor was it required to make findings.

Petitioners claim that they have been trapped into having a deficiency determined that may be greater than what they owe. Their theory is that if it is ultimately determined, in the pending companion cases

dealing with corporation taxes, that the sales were by their corporations, then the amount of net income distributed to them by the corporations would have to be diminished by the amount of the corporation tax to be paid, and hence their personal, as distinguished from transferee, liability would be less. So far as the record before the Tax Court in these cases is concerned, the amount of tax is the same under either of the Commissioner's determinations, even though we may imagine that if the facts were produced by the taxpayers, it would appear that their own individual tax would be different, and perhaps less, if taxed as recipients of a distribution of funds in the nature of a dividend from the corporation, than it would be if they are taxed as the direct sellers of the homes. The taxpayers could have shown this, but elected not to do so. Petitioners were not trapped. The Commissioner, in opposing their motions, pointed out this possibility. In the face of this warning, petitioners persisted with their motions and refusal to produce evidence. One cannot help suspecting that petitioners hoped thereby to diminish their total liability, realizing that the sum of the transferee taxes and their own taxes as distributees of corporate income might be greater than the tax to which they were subjecting themselves by this maneuver. If petitioners have been trapped, no one has trapped them but themselves.

The Internal Revenue Code provides that a decision of the Tax Court dismissing a proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary or his delegate. It also provides that an order specifying such amount shall be entered in the records of the Tax Court, unless the Tax

Court cannot determine such amount from the record in the proceeding. (See 26 U. S. C. Section 7459, subdivision (d).) The rules of the Tax Court, Rule 31(g), provide that failure to adduce evidence in support of the material facts alleged by the party having the burden of proof and denied by his adversary, may be ground for dismissal. Here the taxpayers, who had the burden of proof, failed to adduce evidence in support of their factual allegation that it was they and not their corporations that sold the homes. This would normally result in a dismissal. What the Tax Court did is equivalent to such a dismissal. It simply entered a judgment, as to this issue, determining that the deficiency was the amount assessed by the Commissioner. However, in this case it would not do to remand with directions to dismiss and enter the order contemplated by §7459 (d), because there were other issues that the parties agreed upon, that were determined under Rule 50.

The motion of the petitioners to require the Tax Court to include in the record of these cases the records in other specified cases pending in the Tax Court is denied.

The decisions of the Tax Court are affirmed.

JERTBERG, Circuit Judge (dissenting)

I am in agreement with the majority opinion insofar as it holds that the determinations made by the Commissioner are valid and that the petitions for redeterminations filed by petitioners properly invoked the jurisdictions of the Tax Court. However, I am unable to agree with the majority holding that the Tax Court was under no duty to make findings of fact but could rest

its redeterminations upon the presumption of correctness of the Commissioner's determinations.

I write at some length only because I feel that the decision in this case involves procedural matters which are important in the administration of the Revenue laws.

It is clear, as the majority opinion points out, that the "motions for judgment on the pleadings" were improper. The Tax Court characterized such motions as "meaningless." Such motions, however, might reasonably have been construed as motions requiring the Commissioner to elect which of his conflicting determinations he wished to stand upon.

The Tax Court stated, "It is to be understood that such judgments will be based upon the presumption of correctness of respondent's determinations and petitioners' failure to sustain their burden of proving they were not." Petitioners concede the correctness of the alternative position taken by the Commissioner. Under such circumstances, they should not be required to prove the correctness of the position taken and asserted by him. See *Harbor Plywood Corporation v. Commissioner of Internal Revenue,* 143 F. 2d 780 (9th Cir. 1944), at p. 783.

The two positions taken by the Commissioner are based upon conflicting factual situations which are mutually exclusive. They cannot both be correct. The situation presented is not the application of conflicting legal theories of liability sought to be applied to the same set of facts or determinations made against different taxpayers in respect to the same income.

In the Commissioner's first position, it is asserted that the lot sales were those of the respective corporations and that the net profits are taxable, first, to such corporations and then, as corporate distributions, to petitioners, as stockholders, as ordinary income. In the second position of the Commissioner, it is asserted that the homes were not capital assets but were held primarily for sale to customers in the ordinary course of petitioners' trade or business and that the net profits from the sales were taxable to petitioners as ordinary income.

While this Court has upheld the validity of conflicting determinations by the Commissioner against the same taxpayer in respect to the same income [see *Revell, Inc. v. Riddell,* cited in the majority opinion], such holding was reached because of the duty of the Commissioner to protect the revenue. The duty of the Tax Court is to base its redetermination on law applicable to the case before it. I believe redetermination consists of more than simply adopting the amounts of deficiencies fixed in the Commissioner's determinations in instances where the determinations are based upon conflicting factual determinations which are mutually exclusive. I believe under such circumstances that redetermination should inform the taxpayer as to which determination the presumption of correctness has been applied. Redetermination should inform the taxpayer of the basis of law and fact supporting the redetermination. See *Helvering v. Tex-Penn Company,* 300 U. S. 481, at p. 498. As stated in *Timmons v. Commissioner of Internal Revenue,* 198 F. 2d. 142 (4th Cir. 1952), at p. 143:

> "The court should have found the facts upon which the reconstruction was based so that we could judge

whether or not if was properly made. It is well settled that 'there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion.'"

(Citation of cases omitted.)

To the same effect, see *Estate of Albert E. MacCrone, etc., et al. v. Commissioner of Internal Revenue*, 252 F. 2d 293 (4th Cir. 1958).

In the instant cases the petitioners do not know nor does this Court know, whether the redeterminations are based upon the premise that the net profits realized by the respective corporations from the lot sales are taxable to the petitioners as corporate distributions in the nature of dividends or on the premise that the lots were held by petitioners primarily for sale to customers in the ordinary course of the trade or business of the petitioners and that the net profits from the sales are taxable to petitioners as ordinary income. In my view, it is the duty of the Tax Court to embody in its redeterminations the basis in fact of its decisions. This is particularly true in the instant cases where the record reveals that there are cases pending in the Tax Court wherein the Commissioner determined tax deficiencies against petitioners as transferees of the respective corporations in respect to the same net profits from the lot sales as are involved in the instant cases.

The majority opinion evinces no concern for the plight of the petitioners who conceivably might pay tax on the same income twice without hope of relief. I do not share the view expressed in the majority opinion that the petitioners are simply the victims of their own

cunning legal maneuvers and, therefore, have no right to complain.

I have been unable to find any other decision of the Tax Court wherein the presumption of correctness has been applied by the Tax Court to alternate determinations of the Commissioner against the same taxpayer in respect to the same income based upon conflicting factual situations which are mutually exclusive.

I would remand these cases to the Tax Court with directions to adopt one or the other of the conflicting determinations as the basis for the application of the presumption of correctness. Upon remand, I would suggest that the Tax Court apply its expertise to the question of burden of proof in the circumstances of these cases. In this connection, I call attention to the case of *Lawrence M. Hirsig v. Commissioner,* 4 T. C. M. 848. In that case, two cases were consolidated for trial. In one case the Commissioner made a deficiency tax determination against Hirsig. In the other case the Commissioner made a tax deficiency determination against Lawrence M. Hirsig, Inc., a Corporation. Both determinations related to the same income. In the course of its opinion the Court stated:

> "The conflicting determinations of the Commissioner detract from, if they do not completely nullify any presumption of correctness otherwise attributable to them. *Cf.* Helvering v. Taylor, 293 U. S. 507 [14 AFTR 1194]."

(Endorsed) Opinion and Dissenting Opinion Filed April 13, 1962.

Frank H. Schmid, Clerk.

APPENDIX B-1.

Judgment.

United States Court of Appeals for the Ninth Circuit.

William Malat and Ethel Malat, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 17289.

Upon Petition to Review a Decision of The Tax Court of the United States.

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, and on motion of petitioners to require the Tax Court to include in the record of this cause the records in other specified cases pending in the Tax Court and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to require other records be, and hereby is denied, and that the Decision of the said Tax Court of the United States in this Cause be, and hereby is affirmed.

Filed and entered April 13, 1962.

APPENDIX B-2.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Ben Lesser and Lily Lesser, Petitioner, vs. Commissioner of Internal Revenue, Respondent. No. 17290.

Upon Petition to Review a Decision of The Tax Court of the United States, ...

.....

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, and on motion of petitioners to require the Tax Court to include in the record of this cause the records in other specified cases pending in the Tax Court and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to require other records be, and hereby is denied, and that the Decision of the said Tax Court of the United States in this Cause be, and hereby is affirmed.

Filed and entered April 13, 1962.

APPENDIX B-3.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Louis Rudman and Shirley Rudman, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 17291.

Upon Petition to Review a Decision of The Tax Court of the United States.

.....

.....

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, and on motion of petitioners to require the Tax Court to include in the record of this cause the records in other specified cases pending in the Tax Court and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to require other records be, and hereby is denied, and that the Decision of the said Tax Court of the United States in this Cause be, and hereby is affirmed.

Filed and entered April 13, 1962.

APPENDIX B-4.

Judgment.

United States Court of Appeals for the Ninth Circuit.

Louis Lomas and Claire Lomas, Petitioner, vs. Commissioner of Internal Revenue, Respondent. No. 17292.

Upon Petition to Review a Decision of The Tax Court of the United States, ...

.....

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, and on motion of petitioners to require the Tax Court to include in the record of this cause the records in other specified cases pending in the Tax Court and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to require other records be, and hereby is denied, and that the Decision of the said Tax Court of the United States in this Cause be, and hereby is affirmed.

Filed and entered April 13, 1962.

APPENDIX C.

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, July 17, 1962.

Before: Jertberg and Duniway, Circuit Judges. Davis, District Judge.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of petitioners, filed April 13, 1962, and within time allowed therefor by rule of Court, for a rehearing and rehearing en banc of above causes be, and hereby are denied.

APPENDIX D.

Opinion of the Tax Court of the United States.

William Malat and Ethel Malat, et al.,[1] Petitioners, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 63976-63979. Filed May 31, 1960.

Held, petitioners' motions for judgments against themselves to be based upon findings of fact they concede, are denied, and, since petitioners offered no evidence, judgments will be rendered based upon petitioners' failure of proof.

George T. Altman, Esq., for the petitioners.

Richard W. Janes, Esq., and *Leo K. O'Brien, Esq.*, for the respondent.

Mulroney, *Judge*: When these consolidated dockets were called for trial neither petitioners nor respondent offered any evidence. Petitioners filed motions in all of these dockets which began with the following language:

MOTION

Petitioners move the court for judgment on the pleadings, with the resulting deficiency to be determined under Rule 50, * * *

Respondent determined deficiencies in income tax and additions to tax, as follows:

Docket No.	Petitioner	Year	Deficiency	Additions to tax, sec. 294(d)(2), I.R.C. 1939
63976	William Malat and Ethel Malat	1950	$14,542.59	$1,003.26
		1951	12,746.75	1,092.46
63977	Ben Lesser and Lily Lesser	Taxable year ended Nov. 30, 1950.	12,923.84	1,010.01
		Taxable year ended Nov. 30, 1951.	11,253.70	None
63978	Louis Rudman and Shirley Rudman	1950	15,225.83	1,424.60
		1951	12,950.63	1,142.63
63979	Louis Lomas and Claire Lomas	1950	18,083.77	1,362.28
		1951	9,958.91	1,186.22

[1] The following proceedings are consolidated herewith: Ben Lesser and Lily Lesser, Docket No. 63977; Louis Rudman and Shirley Rudman, Docket No. 63978, and Louis Lomas and Claire Lomas, Docket No. 63979.

Respondent, in the several notices of deficiency, after setting forth the amounts of deficiency indicated above, attached several schedules showing the adjustments made to net income and an explanation of the adjustments. As an illustration a portion of several of these schedules taken from Docket No. 63976 is set forth below. The other dockets here involved all contained similar adjustments which followed the same pattern, differing only in amount.

Taxable Year Ended December 31, 1950

Schedule 1

ADJUSTMENTS TO NET INCOME

Net income as disclosed by the return	$33,339.47
Additional income:	
(a) Ordinary income	$51,866.69

* * * * * * * * * *

Schedule 2

EXPLANATION OF ADJUSTMENTS

(a) Pioneer Plaza, Inc.	$32,962.83 (1)

* * * * * * * * * *

(1) The net profit of $30,045.48 returned by you as a long-term capital gain from the sale of 31 lots, Pioneer Plaza, has been increased to a net profit of $32,962.83 from the sale of 31 homes. The homes are part of a single subdivision tract financed and constructed by Pioneer Plaza, Inc. The corrected net profit was received and retained by you under a claim of right and without restrictions as to its disposition.

It is held the sales were those of Pioneer Plaza, Inc., and the net profits are taxable first to it and then, as corporate distribution to you as a stockholder of Pioneer Plaza, Inc., as ordinary income under section 22(a) of the 1939 Internal Revenue Code.

In the alternative it is held that the homes were not capital assets but were held primarily for sale to customers in the ordinary course of your trade or business. The net profit from the sale is taxable as ordinary income under the provisions of section 22(a) of the Internal Revenue Code of 1939.

The capital gain of $15,022.74 (50 percent of $30,045.48) has been eliminated from your income.

In their petition in Docket No. 63976, petitioners duly assigned error to this and the other adjustments. The assigned error as to the above adjustment was in the manner set forth below and a similar assignment of error was made in the other petitions:

4. The determination set forth in the said notice of deficiency is based upon the following errors:

In respect to the year ended December 31, 1950:

(a) The Commissioner erred in treating the amount of $32,962.83, representing net profit from the sale of 31 homes, as net profit of Pioneer Plaza, Inc., taxable to petitioners as a distribution from said corporation.

(b) The Commissioner erred in treating the said amount of $32,962.83 in the alternative as ordinary income from the sale of said homes by petitioners, instead of as capital gain.

With respect to the adjustments such as previously set forth in Docket No. 63976, and common to all dockets in differing amounts, the motions of petitioners were, in effect, for judgments against the petitioners in the amount determined by the Commissioner upon the additional net income received from the house sales ($32,962.83 in Docket No. 63976) with the judgments in each case to be based upon a finding of fact that adopted the alternative holding in each determination of deficiency as findings of fact. The following quota-

tion from the motions will suffice to show what petitioners seek:

> [T]he Commissioner in his deficiency notice, * * * has held by way of an "alternative" finding that the real estate parcels involved "were not capital assets but were held primarily for sale to customers in the ordinary course of your [petitioners'] trade or business."
>
> Petitioners now ask the court to adopt the said holding of the Commissioner as its finding of fact under these issues.

The dockets that are before us here were set for trial and were heard at the same time as *Louis Lesser,* a Memorandum Opinion of this Court dated May 31, 1960, but, because of another adjustment in that case, which was the subject of dispute, were not consolidated therewith. At the time of submission of these dockets petitioners' counsel stated there was to be no testimony offered by him and that he would rest upon his motions for judgments on the pleadings.

It is obvious that either one of the explanations of the adjustments contained in the second and third paragraphs of respondent's Explanation of Adjustments, will produce the same dollar amount ($32,962.83 in Docket No. 63976) which respondent determined was to be added to the income that is to be taxed as ordinary income.

Petitioners' motions are each simply entitled "Motion," but the first few lines state they are moving for judgment on the pleadings, and petitioners, in argument, refer to the motion as motions for judgments on the pleadings. The name given to a motion is not impor-

tant. The motions do not state the dollar amount of the judgments they request be entered against them but obviously they are requesting judgment for the full amount of the tax deficiency since they ask it be entered on a finding of fact that will produce that sum.

Ordinarily a motion for judgment on the pleadings seeks a judgment in favor of the moving party. These motions seek judgments of this Court against the moving parties in the exact amount of tax determined on the adjustments. That would be the judgments this Court would enter if no motions were filed and no evidence introduced.

The only apparent purpose of the motions would be to have this Court decide in the case of the stockholder, and without any evidence, that his corporation had no income from the sale of residences. Obviously this would not be proper. The cases of the corporations may be pending before this Court. Their liability for tax cannot be adjudicated by such a pleading maneuver as petitioners make.

Since petitioners, who have the burden of proof, submitted their cases on such motions without any evidence, the motions are utterly meaningless. Since they move for judgment against themselves in the exact amount determined, and introduce no evidence, and state they do not care to introduce evidence but will rest on their motions, they have no standing to ask this Court to base its judgments on conceded facts, or any pleading admissions. Respondent's determination of a deficiency is presumptively correct. When there is failure on the part of a taxpayer to introduce any evidence that it is not, the only judgment that will be entered against him

for the determined deficiency will be based upon that presumption of correctness that attaches to respondent's determination and the taxpayer's failure to carry his burden of proof to show it was not.

Petitioners' motions for judgments to be based upon this Court adopting any part of respondent's Explanation of Adjustments as its findings of fact, are denied. Respondent will have judgments against petitioners upon his determinations of tax due based upon his holding of the amounts to be added to income under the adjustments as to house sales which appear in all dockets. Such adjustments are admittedly similar to the adjustment in Docket No. 63976 previously set forth. It is to be understood that such judgments will be based upon the presumption of correctness of respondent's determinations and petitioners' failure to sustain their burden of proving they were not. Both parties state there are stipulations and concessions with respect to other adjustments and that a Rule 50 computation will be necessary in all the dockets.

Decisions will be entered under Rule 50.

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No. 497

In the Supreme Court of the United States

October Term, 1942

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 497

WILLIAM MALAT, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Taxpayers,[1] a husband and wife, received a notice of deficiency from the Commissioner which set forth the amount of the deficiency and in an attached schedule explained the basis for the Commissioner's adjustments to the reported net income. The schedule advised the taxpayers (Pet. App. 25–26):

"Taxable Year Ended December 31, 1950"
"Schedule 1"
"Adjustments to Net Income"

[1] The decisions below determined four separate cases which had been consolidated for hearing. The contentions in each case are similar and, in the interest of simplicity, we will discuss them here on the basis of representative facts from one of the cases.

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Net income as disclosed by the return	$33,339.47
Additional income:	
(a) Ordinary income	51,866.69

* * * * *

Schedule 2
Explanation of Adjustments

(a) Pioneer Plaza, Inc.	32,962.83(1)

* * * * *

(1) The net profit of $30,045.48 returned by you as a long-term capital gain from the sale of 31 lots, Pioneer Plaza, has been increased to a net profit of $32,962.83 from the sale of 31 homes. The homes are part of a single subdivision tract financed and constructed by Pioneer Plaza, Inc. The corrected net profit was received and retained by you under a claim of right and without restrictions as to its disposition.

It is held the sales were those of Pioneer Plaza, Inc., and the net profits are taxable first to it and then, as corporate distribution to you as a stockholder of Pioneer Plaza, Inc., as ordinary income under section 22(a) of the 1939 Internal Revenue Code.

In the alternative it is held that the homes were not capital assets but were held primarily for sale to customers in the ordinary course of your trade or business. The net profit from the sale is taxable as ordinary income under the provisions of section 22(a) of the Internal Revenue Code of 1939. The capital gain of $15,022.74 (50 percent of $30,045.48) has been eliminated from your income."

Upon receipt of this notice, the taxpayers filed a petition in the Tax Court which alleged that the deficiency was in error (Pet. App. 26).

Prior to the time for hearing, the taxpayers filed a motion for "judgment on the pleadings" (Pet. App. 4–5, 28) which moved the Tax Court to enter judgment in favor of the Commissioner for the full amount of the deficiency asserted and upon one of the two alternative grounds set forth in the Notice of Deficiency. The motion provided (Pet. App. 4):

MOTION

> Petitioners move the court for judgment on the pleadings, with the resulting deficiency to be determined under Rule 50, and for that purpose show as follows:
>
> * * * the Commissioner in his deficiency notice, * * *, has held by way of an "alternative" finding that the real estate parcels involved "were not capital assets but were held primarily for sale to customers in the ordinary course of your [petitioners'] trade or business."
>
> Petitioners now ask the court to adopt the said holding of the Commissioner as its finding of fact under these issues.
>
> Petitioners submit for this purpose that they are under no obligation to support by evidence a position taken by the Commissioner in his deficiency notice. * * *

Taxpayers advised the court that they would offer no testimony or evidence and that they would rest upon the motion for judgment on the pleadings (Pet. App. 5, 27).

The Tax Court denied the motion on the ground that it was meaningless because the taxpayers, who had the burden of proof, submitted their case without offering any evidence. It ordered judgment for the Commissioner on the ground that his determinations were presumptively correct and that the taxpayers had failed to sustain their burden of proving that they were not (Pet. App. 5–6, 28–29). The court of appeals affirmed, one judge dissenting (Pet. App. 1–14; 14–18), and denied a petition for a rehearing (Pet. App. 23).[2]

The main question presented by the petitioners is whether the decisions of the courts below should be set aside because the Tax Court did not enter findings of fact to support its deficiency order. The order was entered following a motion by petitioners for judgment in favor of the Commissioner in the exact amount claimed by him. Under these circumstances, the court below quite properly held that there was no need for any findings of fact (Pet. App. 10):

> When the petitioners concede that the tax determined by the Commissioner is owed, as they did in this case, then the fact-finding and law-

[2] On petition for review by the Ninth Circuit, taxpayers had designated as part of the record the records in 15 other cases then pending in the Tax Court which involved taxpayers' liability as transferees of the assets of their real estate corporations (R. 20–21). When these documents were excluded on motion of the Commissioner (R. 23–24), the taxpayers filed a motion in the court of appeals to require the Tax Court to include them in the record (R. 30–34). After a separate hearing on this motion, the court of appeals reserved judgment and then denied the motion at the time of the ruling on the merits (Pet. App. 14, 19–22).

> expounding function of the Tax Court is at an end, and nothing remains to be done except to enter an order determining the amount of the deficiency. That is precisely what the Tax Court did here.

This is also a complete answer to petitioners' contention here that, because of the alternative explanations offered for the deficiency, the burden of proof shifted to the Commissioner and was not sustained by him.[3]

This holding was clearly correct. There is no conflict of decisions. Petitioners cite no case holding that the Commissioner must introduce factual proof or that the Tax Court must make findings of fact in support of a deficiency order where the taxpayers introduce no evidence and move for judgment against themselves in the amount claimed by the Commissioner.[4]

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[3] With reference to the taxpayers' interest in other cases pending before the Tax Court in which they were contesting deficiencies asserted against their real estate corporations, the court of appeals stated (Pet. App. 11):

> * * * what the taxpayers here have tried to do is to execute a maneuver whereby they hoped, without presenting any evidence on the subject, to obtain a binding adjudication that the sales were by them and not by the respective corporations, thereby killing off the other pending cases. The Tax Court refused to lend itself to this little game, and we think that what it did was proper.

[4] As the court below said in its opinion (Pet. App. 12) such cases as *Helvering* v. *Taylor*, 293 U.S. 507; *Helvering* v. *Tex-Penn Company*, 300 U.S. 481; *Harbor Plywood Corporation* v. *Commissioner*, 143 F. 2d 780 (C.A. 9); *Timmons* v. *Commissioner*, 198 F. 2d 142 (C.A. 4); *Estate of MacCrowe* v. *Commissioner*, 252 F. 2d 293 (C.A. 4); and *Welch* v. *Commissioner*, 297 F. 2d 309 (C.A. 4), can have no application here. In most of those cases evidence was received, and the Tax Court was properly required to make appropriate findings; in

There is no merit to petitioner's further contention that the court of appeals erred in failing to order the inclusion in the record of the files and records in other cases involving petitioners then pending before the Tax Court. Had petitioners wished to show from these records that "duplicating and excessive taxes have been imposed" (Pet. 19), they were free to offer such proof in the Tax Court. Their failure to do so did not require the court of appeals to certify as part of the record facts which were not before the Tax Court.

The petition for certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

I. HENRY KUTZ,
MORTON K. ROTHSCHILD,
Attorneys.

NOVEMBER 1962.

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effect, they deal with a shifting of the burden of proof when the taxpayer presents evidence. In *Harbor Plywood*, the Commissioner was held bound by his own determination of the value of certain depreciable assets; there was no such admission by the taxpayer as is here involved. In *Tex-Penn Co.*, the Board had made findings and the court disagreed only with its legal conclusions. In *Welch*, the Commissioner's determination was erroneous on its face.

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IN THE

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OCTOBER TERM, 1962
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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

PETITIONERS' MEMORANDUM IN REPLY.

GEORGE T. ALTMAN,
Beverly Hills, California,
424 South Beverly Drive,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

PETITIONERS' MEMORANDUM IN REPLY.

Respondent in his Memorandum in Opposition, at pp. 4-5, grossly misstates the facts. Petitioners did not in the Tax Court concede that the tax determined by the Commissioner was owed. Their motion, as respondent's own memorandum shows, at p. 3, was not for judgment against themselves; it was to adopt the alternative finding of the Commissioner, which would, as the Tax Court was fully aware (Pet. App. 28), have had the effect of determining still other dockets in their favor. That motion of theirs was not granted; it was denied. (Pet. App. 29). What respondent seeks is to have the judgment without the finding, thus to have the fruits of both a grant and a denial of the motion, at one and the same time.

GEORGE T. ALTMAN,
Attorney for Petitioners.